Supreme Court, U. S.
FILED
JUL 26 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

78-146

PERL G. VAN PELT,
LARRY WAYNE SODERLUND and
RONNIE TORKELSON

Petitioners,

against

STATE OF KANSAS

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KANSAS

Charles S. Scott
Counsel for Petitioners
724½ Kansas Avenue
Topeka, Kansas 66603

(913) 233-0514

Scott, Scott, Scott and Scott

July 24, 1978

I N D E X

Questions Below..... 1

Jurisdiction..... 2

Question Presented..... 3

Statutory Authority..... 4

Statement of the Case: Facts..... 8

The Stage of the Proceedings Herein When Federal Question was Raised.....16

Argument.....16

Certiorari Should be Granted Because this Case Turns On An Issue of Wrongful Search and Seizure Proscribed Under the Fourth Amendment to the United States Constitution And the Fourteenth Amendment to the United States Constitution.....17

This Was an Exploratory Search.....25

The Search Was Conducted Without The Consent of Van Pelt, The Owner of The Vehicle.....29

The Stopping of Van Pelt's Vehicle Was Pretextual, Hence Without Probable Cause to Pursue a Warrantless Search.....31

Summary and Conclusion.....40

I N D E X

PAGE

Appendix 1, The opinion of the Kansas Court of Appeals..... 1a

Appendix 2, Decision dated March 8, 1978, denying petitioners Application to Modify or to Reconsider..... 5a

Appendix 3, Decision dated April 28, 1978, denying Petition for Review to the Supreme Court of the State of Kansas..... 6a

Appendix 4, Memorandum Decision of District Court of Pottawatomie County, Kansas Denying Petitioners Respective Motions to Suppress dated January 25, 1977..... 7a

Appendix 5, Journal Entry of Final Judgement of Conviction rendered in the District Court of Pottawatomie County, Kansas, dated February 21, 1977..... 12a

Appendix 6, K.S.A. 65-4105(d) and K.S.A. 65-4127b (b) (3)..... 15a

Appendix 7, K.S.A. 8-1570(3)..... 16a

Appendix 8, Petitioners Motion to Suppress Illegally Seized Evidence..... 17a

CASE CITATIONS

Amos v U.S., 255 U.S. 313..... 30

Brinegar v U.S., 338 U.S. 160..... 36

Bumper v North Carolina, 391 U.S. 543..... 31

Cady v Dombrowski, 413 U.S. 433.... 29

Chambers v Maroney, 399 U.S. 42.... 29

Cooper v California, 386 U.S. 58... 29

Johnson v U.S., 333 U.S. 10..... 30

Preston v U.S., 376 U.S. 364..... 29

Schneckloth v Bustamonte, 412 U.S. 218..... 30

State v Boster, 217 Kan. 539 P.2d 294..... 26

State v Dean, 2 K. app. 2d 64, ___P.2d ___ (1978)..... 24, 25

State v Van Pelt, No. 49,213, 223 Kan. 2d ___ P.2d ___..... 1

Taglavore v U.S., 291 F.2d 262..... 36

Terry v Ohio, 392 U.S. 1..... 17, 36, 37, 40

U.S. v Brignoni-Ponce, 422 U.S. 873..... 23, 24

U.S. v Chadwick, ___ U.S. ____ (1977) 97 S.Ct. 2476..... 22, 24, 28, 37

U.S. v Escamilla, 560 F.2d 1229 (5th Cir. 1977)..... 24

U.S. v McCaleb, 552 F.2d 717 (6th Cir. 1977)..... 38

U.S. v Short, D. of C. 78 __F.2d __..... 23

STATUTES AND AUTHORITIES

K.S.A. 8-1570 (3)..... 8, 26

K.S.A. 22-2402..... 5, 17, 22, 31

K.S.A. 22-2501..... 6, 18, 22, 27

K.S.A. 22-2502..... 6

K.S.A. 22-3216..... 8, 10

K.S.A. 65-4105 (d)..... 8, 9 10

K.S.A. 65-4127b (b) (3)..... 8, 9 10

28 U.S.C. 1257 (3)..... 3

Fourth Amendment..... 4

Fourteenth Amendment..... 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

PERL G. VAN PELT,
LARRY WAYNE SODERLUND and
RONNIE TORKELSON

Petitioners,

against

STATE OF KANSAS

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KANSAS

Opinions Below

1. The opinion of the Kansas Court of Appeals is reported unpublished under the name and style, State v Van Pelt, No. 49,213, reported in 223 Kan. 2d, ____ P.2d ____, and is annexed hereto as Appendix No. 1.

2. No opinion was rendered by the Kansas Court of Appeals on petitioners' application to modify or to reconsider, but the decision dated March 8, 1978, denying said application is annexed hereto as Appendix No. 2.

3. No opinion was rendered on petitioners' petition for review to the Supreme Court of the State of Kansas but its decision dated April 28, 1978, denying said petition is annexed hereto as Appendix No. 3.

4. A memorandum decision of the District Court of Pottawatomie County, Kansas (John W. Brookens, District Judge), dated January 25, 1977, denying petitioners' respective motions to suppress was not reported; a copy is annexed hereto as Appendix No. 4.

5. Journal Entry of Final Judgment of conviction rendered in the District Court of Pottawatomie County, Kansas, dated February 21, 1977; a copy is annexed hereto as Appendix No. 5.

Jurisdiction

1. The decision of the Kansas Court of Appeals sought to be reviewed was dated and entered in the Office of the Clerk of the Court of Appeals on February 24, 1978 (Appendix No. 1).

2. Petitioners' application to modify or reconsider was denied by order of the Kansas Court of Appeals dated March 8, 1978 (Appendix No. 2).

3. Petitioners' petition for review was denied by order of the Kansas Court of Appeals dated April 28, 1978 (Appendix No. 3).

4. The jurisdiction of the United States Supreme Court to review the final decision of the Kansas Court of Appeals and the Supreme Court of the State of Kansas is conferred by 28 U.S.C. 1257 (3), in that the decision of the Kansas Court of Appeals affirming the conviction of the petitioners' by the District Court of Pottawatomie County, Kansas, and the denial of the District Court of Pottawatomie County, Kansas, of petitioners' respective motions to suppress illegally seized evidence and the refusal of the Supreme Court of the State of Kansas to review the same constituted a denial of these petitioners' rights and privileges protected under the Fourth Amendment to the United States Constitution and those rights, privileges and immunities protected under the Fourteenth Amendment to the United States Constitution.

5. That said decision of the Kansas Court of Appeals is contrary and inconsistent with precedents established by this Court to the effect that personal property and effects cannot be seized under the circumstances of this case without a lawfully issued search warrant under proper authority as provided by law.

Question Presented

Whether it was unlawful for law enforcement officers without a search warrant and without the consent of the owner of a vehicle to pry open the trunk of said vehicle and seize therefrom several sacks of freshly

cut green vegetation appearing to be marihuana, after said vehicle was randomly stopped by one of the officers on the pretext that it may have knocked down and damaged a highway sign either on the previous day or several days previously thereto which sign appeared to have traces of blue paint which were of the same color of the vehicle.

The courts below answered "no".

Statutory Authority

1. Provisions from the United States Constitution - Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Provisions from the United States Constitution - Fourteenth Amendment in pertinent part reads:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

3. Provisions from the Kansas Statutes Annotated pertinent to this petition as follows:

a. K.S.A. 22-2402:

"Stopping of suspect. (1) Without making an arrest, a law enforcement officer may stop any person in a public place whom he reasonably suspects is committing, has committed or is about to commit a crime and may demand of him his name, address and an explanation of his actions. (2) When a law enforcement officer has stopped a person for questioning pursuant to this section and reasonably suspects that his personal safety requires it, he may search such person for firearms or other dangerous weapons. If the

law enforcement officer finds a firearm or weapon, or other thing, the possession of which may be a crime or evidence of crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person."

b. K.S.A. 22-2501:

"Search without search warrant. When a lawful arrest is effected a law enforcement officer may reasonably search the person arrested and the area within such person's immediate presence for the purpose of (a) Protecting the officer from attack; (b) Preventing the person from escaping; or (c) Discovering the fruits, instrumentalities, or evidence of the crime.

c. K.S.A. 22-2502:

"Search warrants; issuance; proceedings authorized. (a) A search warrant shall be issued only upon the written statement of any person underoath or affirmation which states sufficient to show probable cause that a crime has been or is being

committed and which particularly describes a person, place or means of conveyance to be searched and things to be seized, and if the magistrate is satisfied that grounds for theapplication exist or that there is probable cause to believe that they exist, the magistrate may issue a search warrant for the seizure of the following:
(1) Any things which have been used in the commission of a crime, or any contraband or any property which constitutes or may be considered a part of the evidence, fruits or instrumentalities of a crime under the laws of this state, any other state or of the United States. The term "fruits" as used in this act shall be interpreted to include any property into which the thing or things unlawfully taken or possessed may have been converted.
(2)Any person who has been kidnapped in violation of the laws of this state, or who has been kidnapped in another in another jurisdiction and is now concealed within this state, or any human fetus or human corpse.
(b) Before ruling on a request for a search warrant, the magistrate may require the affiant to appear personally and may

examine under oath the affiant and any witnesses he may produce: Provided, That such proceeding shall be taken down by a court reporter or recording equipment and made part of the application for a search warrant."

d. K.S.A. 22-3216 in pertinent part reads:

"Motion to suppress illegally seized evidence. (1) Prior to the trial a defendant aggrieved by an unlawful search and seizure may move for the return of property and to suppress as evidence anything so obtained.

e. K.S.A. 8-1570 (3) - See Appendix 7.

f. K.S.A. 65-4105(d) and K.S.A. 65-4127 b (b) (3) - See Appendix 6.

Statement of the Case: Facts

Since each of the petitioners were charged in separate informations initially in the trial court charging the same identical offense with the possession and intent to seel marihuana, all pleadings and documents contain the same identical information and for the convenience of the Court we are therefore reproducing only those documents and pleadings with reference to Perl Van Pelt.

This is a criminal case wherein each of the petitione s herein were convicted of the offense of possession of marihuana with intent to sell, contrary to K.S.A. 1975 Supp. 65-4105 (d) and K.S.A. 65-4127b (b) (3). The pertinent statutory sections under which the petitioners are charged, K.S.A. 65-4105 (d) and K.S.A. 65-4127b (b) (3) are set forth in Appendix No. 6.

These appeals are from the sentences imposed on each of these petitioners on April 4, 1977, to serve a term for a period of one (1) year and a maximum of ten (10) years. The appeal is also from the trial court's order rendered on March 10, 1977, denying these petitioners motion to set aside the decision of guilty and for a new trial, the trial court's order on January 25, 1977, denying their motion to suppress evidence and various other trial errors.

When special reference is made to any one of the petitioners, he will be identified by his last name. The patrolman, James W. Owens, will be referred to herein as Owens. Don Beseau, Chief of Police, hereinafter will be referred to as the Chief of Police. Harold Etienne, the deputy sheriff, hereinafter will be referred to as the Deputy. When referring to page references of the transcript of the proceedings of the hearing on the motion to suppress, it will be abbreviated as follows: Mtn Hearing followed by the abbreviation TR for transcript and the page number. When making reference to the transcript of the trial proceedings herein, it will be identified with the letter T referring to trial followed by the abbreviation TR for transcript and the page number.

Each of the petitioners, in addition to one Kenneth Browning, were charged, in separate informations, with the offense of possession with the intent to sell marihuana contrary to the provisions of K.S.A. 1975 Supp. 65-4105 (d) and K.S.A. 65-4127b (b)(3).

Pursuant to an agreement of all petitioners and the prosecution with the approval of the trial court, all cases were consolidated for the purpose of trial before the trial court, thereby waiving trial by jury (See Journal Entry (Appendix No. 5) and T TR 4). Accordingly, the matters proceeded to trial on the 21st day of February, 1977 (Journal Entry (Appendix No. 5) and T TR 4 and 5).

Upon the completion of the State's case in chief, each of the petitioners moved for a judgment of acquittal, with the trial court sustaining as to Kenneth Browning and overruling as to the petitioners herein (T TR 141-146).

Prior to the date of trial herein, each petitioner filed his separate motion to suppress evidence pursuant to K.S.A. 22-3216 (See Appendix No. 4). The motions were consolidated for the purpose of hearing, with the approval of the trial court, which was held on January 13, 1977. Thereafter on the 25th day of January, 1977, the trial court rendered his Memorandum Decision Denying each motion (Appendix No. 4). The same motions on behalf of the petitioners were renewed at the trial, which were once again denied by the trial court (T TR 5 and 146). Following the trial herein and within the statutory period, the petitioners filed their joint motion to set aside the trial

court's decision of guilty and for a new trial. Thereafter, on the 10th day of March, 1977, pursuant to a hearing thereon, the trial court denied the petitioners' motion (Mtn Hearing TR 66 and Appendix 5). Then on the 4th day of April, 1977, the petitioners were thereupon sentenced, as aforesaid (Mtn Hearing TR 74, 79 and 82).

The facts and circumstances leading up to the filing of the charges herein can be described as follows:

It was in the wee hours of the morning, at or about 5:20 or 5:30 a.m., on September 21, 1976, when Owens, an Officer of the St. Marys, Kansas, Police Department, was patroling the main street of St. Marys, when he observed a blue vehicle going west, dragging what appeared to be corn or milo stalks hanging underneath the vehicle (Mtn Hearing TR 4-5 and T TR 10). According to a portion of the testimony of Owens:

> "We had had, a few days before this we had several signs knocked down along the highway by a blue vehicle. There was a blue paint left on the signs and I had took a chance to stop this vehicle to check and see if there was any damage to it to see if it might have been the one involved in this vandalism deal." (Mtn Hearing TR 5, T TR 10)

The vehicle was a 1962 or 1963 blue Thunderbird Ford operated and owned by Van Pelt, one of the petitioners herein, occupied by the three (3) other petitioners as passangers (Mtn Hearing TR 6 and T TR 13)

Owens proceeded to stop the vehicle by first turning on his flashing red light from his patrol car (Mtn Hearing TR 6 and T TR 11). After stopping the petitioners' vehicle, Owens ran a check on the license plate. Van Pelt identified himself by showing his driver's license and informed Owens that the tag did not belong to the car, but on another car owned by him, because he had recently purchased the car and the title had not been transferred (Mtn Hearing TR 6 and T TR 12). Owens then asked Van Pelt if he had in his possession a bill of sale or some document as evidence to show ownership. This conversation took place with Van Pelt and Owens outside of the car. In the meantime, Van Pelt returned to his car and sat down with the door open and commenced searching through his billfold (Mtn Hearing TR 6 and T TR 12). During the time Van Pelt was searching through his billfold, Owens who was standing outside of the car with the door open, stated he detected an odor of green marihuana (Mtn Hearing TR 7 and T TR 13). Immediately thereafter:

> "I radioed the sheriff's office to ask for a back-up unit. Then I asked the driver if he would back his vehicle over into a parking lot." (Mtn Hearing TR 8 and T TR 15)

Soon thereafter, Etienne, a deputy sheriff of Pottawatomie County arrived and then shortly thereafter the Chief of Police of the St. Mary's Police Department arrived (Mtn Hearing TR 8 and T TR 17-18). While waiting for the Deputy and the Chief of Police to arrive, Owens at the trial testified with reference to seeking permission to search the trunk of Van Pelt's car:

Q Did you have any conversation with the driver, or the passengers in the automobile at this time?

A Yes, I believe I did with the driver.

Q Could you relate this conversation to the Court . . .?

A I asked him if I could look in the trunk of his vehicle.

Q What did he say?

A He says, 'I don't have any way of opening it.' (T TR 16)

At the hearing on the motion to suppress, with respect to seeking permission to search the trunk, Owens gave the following testimony:

Q Okay, what happened next after you did that?

A We asked the driver of the vehicle about opening the trunk of his vehicle.

Q Who was the driver?

A Mr. Van Pelt.

Q Okay

A And he said he had no key for the trunk; the lock was gone, which indeed it was. (Mtn Hearing TR 9)

Apparently, after the arrival of the Deputy and the Chief of Police, Van Pelt

was once again asked for permission to open the trunk. Owens at the hearing on the motion to suppress gave this account:

Q Who asked the driver to look in the trunk?

A I believe I had asked him myself, if I could look in the trunk, and he informed me he didn't have a key to it.

Q What did he say exactly, if you can remember?

A That he had no way of opening it. (Mtn Hearing TR 9-10)

At the hearing on the motion to suppress, the Chief of Police asked for permission to search the trunk.

"He didn't give permission but he just stated he had no way of opening it . . ." (Mtn Hearing TR 36)

At the trial, the Chief of Police gave this account with respect to seeking permission to open the trunk after he arrived:

". . .I asked Mr. Van Pelt about searching the trunk of the car and he stated that he didn't have any key to it." (T TR 47)

When the Deputy and the Chief of Police arrived, Van Pelt's car had been driven to the parking lot adjacent to the main street (T TR 18). The petitioners were directed to get out of the car and the Deputy frisked

them. As a result of the search no weapons were found on any of the petitioners. Nor was there any apprehension that any of the petitioners would make any threats upon the officers or any attempt to escape custody (T TR 19). In the meantime, the Deputy and the Chief of Police made a search of the interior of the car and observed corn knives, a lantern, water jug and other items (Mtn Hearing TR 36 and T TR 45). The Chief of Police stated he observed the odor of what he thought to be marihuana (T TR 45).

Following the frisking of the petitioners, the search of the interior of the car and the refusal of Van Pelt to give permission to search the trunk, the Chief of Police obtained a screwdriver from his car and thereafter, upon his return to the Van Pelt car, proceeded to insert the screwdriver in a hole in the trunk and succeeded in opening it (Mtn Hearing TR 37 and T TR 48). After opening the trunk, the Chief of Police stated he observed six (6) gunnysacks and he opened up one which contained green vegetation which, in his opinion, was marihuana. Thereupon he placed all four (4) petitioners under arrest for possession (Mtn Hearing TR 37-38 and T TR 48). The Deputy was directed to administer the Miranda warning which he did by reading it from a card (T TR 48-49). The reading of the warning was presented to the petitioners as a group and not individually (T TR 92).

Van Pelt drove his car, accompanied by the Chief of Police following his arrest, to the police station and then to the sheriff's office in Westmoreland, Kansas.

From the very inception of stopping the Van Pelt car throughout to the moment that these petitioners were incarcerated in the county jail at Westmoreland, or at any time, were they advised that they were being stopped under any suspicion of being involved in any vandalism of highway signs, or otherwise involved in the commission of any crime whatsoever (Mtn Hearing TR 16-24 and T TR 27). Nor were the petitioners placed under arrest after Owens detected the odor of marihuana emanating from Van Pelt's car (T TR 27).

The Stage of the Proceedings Herein When the Federal Question was Raised

The constitutional issue of a wrongful search and seizure of the vehicle in question was raised by these petitioners when they filed their respective motions to suppress illegally obtained evidence (Appendix No.8) on or about November 11, 1976.

Again, their motions to suppress were renewed immediately preceeding the trial on February 21, 1977 (T TR 8). On both occasions the trial court denied said motions (T TR 8, Appendix 4).

Argument

1. Certiorari should be granted because this case turns on an issue of wrongful search and seizure proscribed under the Fourth Amendment to the United States Constitution and the Fourteenth Amendment to the United States Constitution.

2. The decision herein rendered is in conflict and inconsistent with precedents established by this Court.

3. This case raises a substantial Federal issue.

CERTIORARI SHOULD BE GRANTED BECAUSE THIS CASE TURNS ON AN ISSUE OF WRONGFUL SEARCH AND SEIZURE PROSCRIBED UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The decision of the Kansas Court of Appeals (Appendixl) indicated that the initial stop of the petitioners car was proper under the "stop and frisk" statute, K.S.A. 22-2402 (1) authorizing an officer to stop a person whom he reasonably suspects has committed a crime. In reading the decision, it is difficult to determine whether that decision rested upon that rationale. Assuming that the stop and frisk theory was utilized, the facts and circumstances herein removes this case from the orbit of Terry v Ohio, 392 U.S. 1. There this Court set forth the criteria (and incidently codified in K.S.A. 22-2402 (1)) to be observed when an officer seeks to stop and frisk a person. It appears the first consideration is that the officer is deserving of the right to search for weapons in situations where probable cause to arrest for a crime is lacking. Secondly,

that there is probable cause to believe that the person has committed or is committing a crime. Even then he must be apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime and in the absence of that kind of evidence he is unjustified in making an intrusion short of an arrest.

The criteria for conducting a warrantless search is set forth in K.S.A. 22-2501:

> "When a lawful arrest is effected a law enforcement officer may reasonably search the person arrested and the area within such person's immediate presence for the purpose of (a) protecting the officer from attack; (b) preventing the person from escaping; or (c) discovering the fruits, instrumentalities, or evidence of the crime."

A proper analysis of the evidentiary record herein clearly illustrates that the search of the Van Pelt car was not in compliance with the statutory criteria prescribed in K.S.A. 22-2501, supra.

In the first place, there was no lawful arrest. But assuming for the purpose of argument that a lawful arrest was effected, there is nothing in this record to show that the abortive search was for the purpose of protecting Owens from attack. Moreover, the evidence is to the contrary. This is borne out by Owens and the Deputy's own testimony in their answers illicited on their cross examinations respectively, both at the hearing on the motions to suppress

and at the trial. Owens, at the hearing on the motion to suppress:

Q . . . Now, officer, when you went up, when you stopped the car and the car just stopped after he observed your dome light or flashing light?

A Yes.

Q . . . And obviously you got out of your car and walked over to the driver's side.

A As I got out the driver got out also and walked back toward me.

Q Toward you. Did he walk normal?

A Yes.

Q Didn't appear to be suspicious or anything?

A No.

Q . . . Did he have a weapon on his person?

A Not to my knowledge, no.

Q . . .

A . . .

Q . . . So at the time you didn't suspect anything, did you?

A No. (Mtn Hearing TR 18-19)

Q . . . Now, did either one of these defendants attempt to escape?

A No.

Q . . . Did you have any suspicion that they were armed or wanted to do you any harm?

A. No. (Emphasis added)(Mtn Hearing TR 28)

The Deputy at the trial:

Q Now, you didn't have any difficulty with either of these subjects after you got over there, did you?

A No, sir.

Q When I say "over there", I'm referring to the place where the car was stopped.

A No, sir.

Q They all cooperated, didn't they?

A They did. (T TR 110)

Moreover, Owens was even unarmed at the time Van Pelt got out of his car after being stopped (Mtn Hearing TR 18). Nor did the Chief of Police or the Deputy feel the need to draw weapons when conducting the search of the petitioners, or at any time during their participation of the search of the car or when transporting the petitioners to the police headquarters and to the county jail. Moreover, the trial court, in His Memorandum Decision (Appendix 4) denying the motion to suppress made this finding: "All defendants

were polite and docile at all times; none carried a weapon."

Accordingly, none of the officers were apprehensive of being attacked, nor possessed with any fear of the petitioners escaping.

With respect to the criteria requirement of discovering the fruits or instrumentalities or evidence of the crime, there was none to be found because of the circumstances.

It should be borne in mind, that the initial stopping was based upon the pretext that the car may have been involved in acts of vandalism of damaging highway signs. According to Owens, one of such damaged signs appeared to have on it blue paint which was located on the east edge of St. Marys adjacent to a corn field (Mtn Hearing TR 5 and 13; T TR 10 and 24). Thereupon, Owens took the risk of stopping the Van Pelt car because it was blue in color and was dragging several corn stalks. As he put it:

> ". . . I had took a chance to stop this vehicle to check and see if there was any damage to it to see if it might have been the one involved in this vandalism deal." (Mtn Hearing TR 5; T TR 10)

From Owens' own admission, his examination of the car revealed no damage (Mtn Hearing TR 16). Notwithstanding, Owens' failure to discover any damage to the Van Pelt car, his justification for stopping the car was his purported suspicion of the car being

involved in a crime of vandalism. Hence the fruits or evidence of this particular crime would be the corn stalks and the car itself. Ironically enough, however, nothing was done about seizing the corn stalks, nor was any inspection made thereof or at the location of the sign to determine if the stalks, in fact, were missing from that location.

In a most recent case of the United States Supreme Court, U.S. v Chadwick, ____ U.S. ____ (1977), 97 S.Ct. 2476, the Court said:

> "When a custodial arrest is made, there is always some danger that the person arrested may seek to use a weapon, or that evidence may be concealed or destroyed. To safeguard himself and others and to prevent the loss of evidence, it has been held reasonable for the arresting officer to conduct a prompt warrantless 'search of the arrestee's person and the area within his immediate control' --construing that purpose to mean the area from within which he might gain possession of a weapon or destructible evidence."

Albeit, the criteria prescribed in K.S.A. 22-2501, supra, refers to situations involving the effecting of a lawful arrest, which is absent here, but since the initial detention carried with it all indicia of an arrest, whether lawful or unlawful, Owens and the other two (2) officers were thereby required to comply with the mandate of K.S.A. 22-2501 and K.S.A. 22-2402 (1), supra.

With respect to Owens probable cause to stop petitioners vehicle initially, there is a lot to be said of the remoteness and the vagueness of the relationship of the stopping and the search. There is no nexus of the color of the alleged blue paint being on the damaged highway sign and the color of petitioners car.

The situation herein is the same as was held in the most recent case of U.S. v Short, (D. of C. 78 ___F.2d___). There a general description of a burglary suspected broadcasted over the police radio did not give probable cause for an officer to search a suspect which heroin was discovered in the process. The Court went on to say that the description was insufficient to narrow the number of suspects to a level tolerable under the Fourth Amendment. As here the description of the petitioners car as being blue would likewise be insufficient to narrow this vehicle as being suspected of knocking down highway signs when you consider the large number of blue vehicles that travel daily upon the highways of these United States.

This was a random stopping of petitioners vehicle. It is abundantly clear that this was a pure and unequivocal random stopping of petitioners vehicle notwithstanding the pretext that Owens claimed that he took a chance to stop this vehicle to check and see if there was any damage to it to see if it might have been the one involved in a vandalism deal.

The instant case is controlled by the principles announced in U.S. v Brignoni-Ponce, 422 U.S. 873, which involved clearly suspicious circumstances for stopping vehicles coming across the border from Mexico into

the United States bringing into this country illegal aliens. One of the vital elements of the Brignoni-Ponce test is whether the agents had reason to believe the vehicle in question had come from the border.

The Brignoni-Ponce case was relied on in U.S. v Escamilla, 560 F.2d 1229 (5th Cir. 1977). There the court condemned the stopping of a vehicle and a subsequent search suspected of coming across the Mexican border into the United States on the suspicion it was transporting illegal aliens into the country. After the stopping of the vehicle, the agent detected a strong odor of marihuana emanating from the vehicle. Based on these observations the agent searched the truck and discovered 2,844 pounds of marihuana underneath the bale of hay. Upon making this discovery, the defendant there was placed under arrest. The conviction of the defendant was struck down based upon the facts and circumstances presented.

Then again, in a most recent case of this Court, U.S. v Chadwick, supra, the Court struck down a seizure of marihuana as constituting an unlawful invasion by seizing a foot locker without a search warrant.

The Chadwick case was principally relied upon in State v Dean, 2 K.app.2d 64, ____ P.2d ____ (1978). There the defendant when operating his vehicle was apprehended forspeeding after being pursued for a considerable distance by the officer. During the chase the defendant lost control of his vehicle which jumbed a curb and crashed into the back of a parked pickup truck. When the officer approached the vehicle, he observed the

defendant putting something under the seat. The defendant was ordered out of his car, he was searched for weapons, handcuffed and detained until another officer arrived whereby the defendant was taken into custody. One of the officers returned to the defendant's car where he observed an overnite case directly under the open door. He thereupon opened the locked case and discovered four (4) bags of marihuana. The trial court overruled defendant's motion to suppress and on appeal the decision denying the motion was reversed.

The Dean case and other similar cases adjudicated by the Kansas appellants courts illustratesa more obvious situation providing probable cause for warrantless searches than the instant case.

This Was An Exploratory Search

Owens, having satisfied himself that the car was not involved in any vandalism activity, he, the Chief of Police and the Deputy were without any legal authority to conduct any exploratory search of the car without a search warrant. The question then emerges, with respect to the practicality of procuring a search warrant. It should be remembered that Owens stated that in the first instance, when he detected what he believed to be an odor of freshly cut marihuana emanating from the car, coupled with his observance of the paraphernalia within the interior of the car, was sufficient cause for him to have placed the petitioners under arrest (T TR 27). Had he effected an arrest, the petitioners thereupon would have been placed under the legal custody of the officer

which would have authorized him to have seized the car, permitting it to be removed to a place for the purpose of protecting the car and preserving the contents therein.

Under the circumstances herein, the officer was authorized to impound the vehicle under K.S.A. 8-1570 (3) which provides:

> "When the person driving or in control of such vehicle is arrested for an alleged offense for which the officer is required by law to take the person arrested before a proper magistrate without unnecessary delay."

It is true that the initial stopping of the Van Pelt car occurred at or about 5:20 or 5:30 a.m. If the circumstances were such that the Chief of Police and the Deputy were called in as was done here, then by the same token, the District Judge or the Associate District Judge perhaps could have been approached with a request, as provided under K.S.A. 22-2502, to issue a search warrant. If either officer was to conceive that such approach, at this ungodly hour of the morning would have unnecessarily constituted encroachment upon the private sanctity of the home of either of the judges, then there was nothing about the exigencies of the situation, presented here, to have prevented the impounding of the car as aforestated, incarcerating the petitioners, then at some convenient time during regular business hours make application for a search warrant.

The situation, here, is very much akin to the logic and well reasoned decision reached in State v Boster, 217 Kan, 539 P.2d 294.

There the principal issue before the Court concerned the constitutional validity of an inventory search of a vehicle drived by the defendant and impounded by the police pursuant to defendant's arrest on a traffic violation. It appeared that a burglary had occurred where numerous items were stolen. The following day a patrolman received a dispatch over the police radio notifying that two (2) suspicious vehicles were parked at a certain location. It was reported that a large amount of coins had been seen lying on the front of the car. A short time later the patrolman observed the defendant driving away with the other car. The patrolman proceeded to stop both cars a block away. The defendant and his passager were ordered out of the car and frisked. When the defendant could not produce a driver's license upon request, he was handcuffed and taken to the police station in the patrol car. At the police station defendant was unable to post bond or pay a fine, so he was booked and jailed. A warrantless inventory search was made of the car as was customary procedure prior to impoundment of a vehicle. Pursuant to the inventory of the car, the police searched the trunk and found a number of items, which were later identified as the property involved in the burglary. In support of defendant's motion to suppress, among other grounds, he argued that said search was conducted without a search warrant and without his consent, contrary to the Fourth Amendment to the United States Constitution and the Bill of Rights of the Constitution of the State of Kansas, and to K.S.A. 22-2501.

In reversing the lower court's order denying defendant's motion to suppress, the Kansas Court said:

> "We do not disapprove the impoundment of vehicles under proper circumstances. We recognize the necessity of the state to protect by appropriate inventory measures both the valuables of the arrested person and its possible liability to tort claims. Nonetheless, the police must first have legal custody of a vehicle before making an inventory of its contents." (Emphasis Added)

As here, Owens apparently did not feel comfortably certain that there was sufficient evidence to support an arrest of the petitioners when he first detected the odor of what he thought was marihuana. Failing to effect the arrest at that time or any time prior to the inventory search of the trunk, the officers did not have legal custody or even the right to legal custody of the car which would authorize the warrantless search.

In U.S. v Chadwick, supra, Chief Justice Burger speaking for the majority of the United States Supreme Court stated:

> "In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be

> searched comes under the exclusive dominion of police authority."

As here, there were no exigency circumstances shown to the extent that the car and its contents were about to be removed from this jurisdiction or be destroyed, which warranted an immediate search. Moreover, the officers had complete control of the situation plus the cooperation of the petitioners, making it most convenient for the officers to utilize the processes of law to procure a search warrant. See Chambers v Maroney, 399 U.S. 42; Cooper v California, 386 U.S. 58; Cady v Dombrowski, 413 U.S. 433.

The sad truth is that there was no relationship between the purpose for stopping the vehicle and the subsequent search. This was the basis for the holding in Preston v U.S., 376 U.S. 364, where this Court gave its approval to the suppression of an application to suppress where it appeared there was no relationship between the arrest for vagrancy, the reason for seizing and the reason for searching it.

The Search Was Conducted Without The Consent Of Van Pelt, The Owner of the Vehicle

There can be no doubt that where a person freely gives his consent to a search, such consent will validate the search without a warrant.

Here, Van Pelt was first asked by Owens if he, Owens, could open the trunk. Van Pelt's reply was he did not have a key to the trunk (Mtn Hearing TR 9-10). When the

Chief of Police and the Deputy arrived at the scene, a second request was made, either by Owens, and perhaps a third request was made by the Chief of Police. Here the evidence is not clear. But at any rate, Van Pelt's reply was the same, that he did not have a key to the trunk. It is interesting to note that at no time did Van Pelt give his permission to the Chief of Police, or to anyone, to use a screwdriver or any other instrument to gain entrance into the trunk. Neither did the Chief of Police seek permission to use a screwdriver to gain entrance into the trunk.

It has been held that mere submission to authority is not consent. See Johnson v U.S., 333 U.S. 10; Amos v U.S., 255 U.S. 313.

In Schneckloth v Bustamonte, 412 U.S. 218, the defendant was stopped for a traffic violation. The officer asked the defendant whether he could search the trunk. The defendant gave a reply, "Go Head". The Court was called on to consider the voluntariness of the consent. Holding that the consent was not voluntary the Court said:

> "When the subject of a search is not in custody and the State would justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate the consent was in fact coluntary; voluntariness is to be determined from the totality of the surrounding circumstances."

The Court further held that the consent must not be given as the result of duress or coercion, expressed or implied. Moreover, the burden is upon the procution to show in conducting warrantless searches that the owner or the person in possession of a vehicle gave a valid consent. This burden cannot be discharged by showing no more than acquiescense to a claim of lawful authority. Bumper v North Carolina, 391 U.S. 543.

The Stopping of Van Pelt's Vehicle Was Pretextual, Hence Without Probable Cause To Pursue a Warrantless Search

Here, the threshhold question is whether Owens had sufficient information when he stopped the petitioners' car to reasonably suspect they had committed a crime. Or, putting it another way, is whether the damage to highway signs was legally sufficient, under the circumstances herein reflected, to support Owens' purpose in stopping the vehicle, or was the stopping a mere pretext, later formulated, to serve as a justification for the warrantless search.

The trial court's memorandum decision reflects most vividly that he struggled relentlessly to find the proper rationale to support his decision denying the motions to suppress. Accordingly, at one point he alludes to the "stop and frisk" statute, K.S.A. 22-2402, supra.

Pursuant thereto, the trial court proceeded to hold that Owens knew, prior to stopping the Van Pelt car, that a crime had been committed; that a highway sign had been knocked down by a blue colored car, and this

was close by a cornfield. Owens was justified and acted accordingly, based upon his suspicion that the vehicle was involved in such crime (T TR 16). To assess the correctness or incorrectness of the trial court's ruling, as well as the good faith of Owens' suspicion prompting him to stop the Van Pelt car, we should make a brief analysis of the facts relating thereto.

Owens, on cross examination at the trial, testified that he prepared a written report dated September 21, 1976, reflecting facts and circumstances relative to the stopping of the car and all transactions relating thereto. He was asked to read into the record the content of his report, with respect to the damaged highway signs, which disclosed the following:

Q Would you read it.

A On the 9/21/76, at approximately 5:20 hours, while on patrol to St. MArys, a Ford T.B., bearing Kansas tag, blue in color, was observed by myself westbound on Bertrand. I further observed several corn stalks dragging from the underside of the vehicle. I was aware several road signs had been knocked arounty (sic) lately, two of them being in the St. Marys area; one of the signs hit and knocked down near St. Marys had blue paint on the pole. (Mtn Hearing TR 12-13)

In addition thereto, the Chief of Police prepared a complaint and Report of Investigation dated September 21, 1976. Pertinent excerpts therefrom were read into the record:

> "Owens stated he had observed the blue or green-blue Ford westbound on U.S. 24 (Bertrand Avenue) with several corn stalks handing from the undercarriage and dragging the pavement. Owens made a routine stop of the vehicle reference highway signs that been hit and knocked down or broken in the area during the past several weeks. One of these signs had traces of blue paint on the broken pole, and the last sign noted hit and broken was at the east edge of St. Marys near the end of a corn field" (Mtn Hearing TR 11).

It is clearly noticeable and most significant that the statement of Owens reveals that he was aware of several signs had been knocked down around the county lately, two of them being in the St. Mary's area. One of such signs near St. Marys had traces of blue paint on the pole. Of equal significance, in the report of the Chief of Police he quotes Owens as saying that highway signs had been hit and knocked down or broken in the area during the past several weeks. Moreover, there is nothing in either of these statements to indicate that these highway signs were damaged as a result of any criminal activity, be it described as vandalism or malicious destruction of public property. Nor is there any evidence appearing in the record, either at the hearing on the motion to suppress or at the trial, indicating that the damage to the highway signs was the result of any criminal activity. Owens for the first time in his testimony would mention the word "vandalism" as being the contributing factor to the sign damage.

Nevertheless, his first and only attempt was made in his testimony to attribute the sign damage to acts of vandalism, notwithstanding that his report, which was prepared shortly after the occurrence in question, when all the facts were fresh in his mind, and he only refers to the sign damage resulting from being knocked down or hit. Even in the trial court's findings, it is mentioned:

> "His purpose in stopping the vehicle was to determine whether this vehicle might be involved in roadsign damage; he suspected that it might be."

Here, the trial court is somewhat reluctant to label the sign damage as a criminal activity, notwithstanding that his conclusion was to the effect that Owens knew, prior to stopping the vehicle, that a crime had been committed.

The mere fact that the signs were damaged, and in view of the evidentiary record herein, it cannot be assumed nor can we speculate that the damage was the result of any criminal activity. Logically, the damage could have resulted from an unavoidable automobile accident or from many causes. It is therefore unfair and unjust to rest on the mere assumption, for the purpose of providing probable cause for the stopping of a vehicle, that criminal activity was the contributing factor to the damage of the signs. Other factors of significance are the time frame in which Owens claims he became aware of the damaged signs. In his own statement he vaguely fixes the time "lately" when he

became aware. His statement to the Police Chief was within several weeks. His testimony at the hearing on the motion to suppress:

> "We had had, a few days before this we had several signs knocked down. . ." (Mtn Hearing TR 5)

On Cross examination:

Q Officer Owens did I understand you to testify that it was a matter of a few days prior to September 21, 1976 that certain highway signs had been knocked down by a vehicle resembling the vehicle in which these subjects were found, these defendants?

A This had been going on for some time around the county. It was probably a couple days before this that these had been knocked over. (Mtn Hearing TR 10)

At the trial on cross examination:

Q When did you observe that sign was knocked down?

A I believe the first time I had seen it was the evening before (T TR 25).

The inconsistencies herein noted, help to clearly demonstrate that Owens and perhaps others concocted this whole story of the damaged sign theory for the purpose, and the only purpose, of attempting to formulate a probable cause base upon which to justify the stopping of the Van Pelt vehicle.

If the facts were such, as Owens would have us believe, as to when he first became aware of the damaged signs, there would be no variances of the time frame, if he were stating the truth, from lately to several weeks -- 2 days to day before the date of incident.

Another factor of importance going to Owens' lack of good faith in his suspicion of a crime having been committed prior to the stopping of the Van Pelt vehicle, is that he did not apprise Van Pelt or any of the other petitioners of the purpose for which they were being stopped (T TR 27; Mtn Hearing TR 16). Normal police procedure and the mandate of the Fourth and Fourteenth Amendments and of the "stop and frisk" statute, K.S.A. 22-2402, supra, dictates that the officer apprise the subject of the purpose for which he or she is being stopped. Without this requirement citizens would fall victim, constantly, to law enforcement officers of being stopped without any legal justification whatsoever.

Moreover, the search must be either an incident to the arrest or based on probable cause and if an incident to an arrest, but not visa versa. The violation of a constitutional right by subterfuge cannot be justified. Taglavore v U.S., 291 F.2d 262. It must be remembered that probable cause means more than a bear suspicion. Brinegar v U.S., 338 U.S. 160.

The gist of Terry, supra, was to the effect that the Fourth Amendment applies to "stop and frisk" procedures. In arriving at a determination whether the Fourth Amendment

was violated by police officers' seizure of person by way of stopping him for interrogation, the notions which underlie both the warrant procedure and requirement of probable cause remain definitively relevant. It goes on to say that a police officer's conduct for the purpose of making proper assessment thereof, it is necessary first to focus upon the governmental interest which allegedly justified official intrusion upon the constitutionally protected interests of a citizen and to justify that intrusion, the police officer must be able to point to specific articularable facts which is to be considered with rational inferences from those facts which would reasonably warrant an intrusion.

As here, Owens was not able to articulate any good faith facts of reasoning to justify the stopping of the Van Pelt vehicle as we have discussed in some detail throughout this brief. We have emphasized that the damaged sign theory was a mere pretext, or was concocted after the fact, i.e., discovery of the marihuana and other items in the Van Pelt vehicle, and after these petitioners were arrested and incarcerated. These facts and circumstances obviously goes against the grain of Terry, supra.

As was said in Chadwick, supra:

> "In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority."

As we have previously discussed herein, had Owens effected arrest of Van Pelt for illegal car tags this would have permitted the car to be impounded, affording ample opportunity to procure the proper search warrant to conduct a legal search of the contents of the car.

As here, we have Owens telling us about damaged highway signs which he may have become aware of either late, however, this is to be interpreted, before September 21, 1976, or perhaps he became aware three weeks prior thereto, two days, or the evening before September 21, 1976. The fact that he, or someone, had observed traces of blue paint on one of the broken signs on the east edge of St. Marys, he began to rationalize that the blue car he stopped may have been involved in damaging this particular sign. Also as we have already indicated herein, there is nothing in Owens' testimony or anyplace in this record, that would indicate that a crime had been committed with respect to the damage of the signs, unless you speculate that these signs were damaged pursuant to acts of vandalism. We respectfully submit that the sign damage theory is totally speculative and remote to constitute a probable cause stopping and arrest of these petitioners.

This Court and many of the United States Courts of Appeal have struck down convictions that were predicated upon illegally obtained evidence pursuant to warrantless searches based upon the pretext of what is commonly referred to as "drug courier profile". In a very recent case coming from the 6th Circuit, U.S. v McCaleb, 552 F.2d 717 (6th Cir. 1977), there the Court held:

"A drug courier profile by itself, provides no probable cause to arrest a person."

Once again in the instant case, Owens sitting in his patrol car in the wee hours of the morning of September 21, 1976, perhaps with nothing to do and had done nothing throughout the evening, when observing the Van Pelt vehicle with the corn stalks being dragged from underneath felt the need to stop, primarily for the purpose of making an inquiry about the corn stalks. His conduct can be reasonably construed as constituting a random stop. It should be remembered that the Van Pelt vehicle was the only car that was stopped under the suspicion of being involved with the damage of the highway signs. It is strange indeed that Owens would be thinking about minor offenses of damage of a highway sign at this ungodly hour of the morning. Moreover, Petitioners' Exhibit No. 1, which purports to be a report of damage to highway signs that was reported to the State Highway Department reflects no mention of any highway signs being damaged within the close proximity of September 21, 1976.

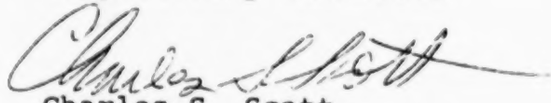
We respectfully submit that the Owens probable cause of damaged stop signs for stopping the petitioners initially was wholly unwarranted. Furthermore, the search that followed and the discovery made thereto is totally unrelated to the suspected offense which formed the basis of stopping the vehicle.

Summary and Conclusion

This case presents a classical situation of obvious violations of Fourth Amendment rights to be secure in one's property and personal affects without an intrusion of governmental authorities. The facts clearly discloses in this record that the officers forceably upened the trunk of Van Pelt's vehicle. This constituted a flagerant violation of these petitioners rights protected under the Fourth Amendment and the approval of this conduct by the courts below is contrary and inconsistent to the many decisions of this Court in condemning this type of activity. The criteria so clearly set out in Terry v Ohio, 392 U.S. 1, and the other decisions of like nature prohibits the type of conduct of the officers herein described.

A writ of certiorari should issue to review the decision of the Kansas Court of Appeals.

Respectfully Submitted



Charles S. Scott,
Counsel for Petitioners
724½ Kansas Avenue
Topeka, Kansas 66603
(913) 233-0514
Scott, Scott, Scott & Scott

Dated: July 24, 1978

For the sake of efficiency, the case captions have been removed from Appendix Numbers 1, 2, 3, 4, 5 and 8.

APPENDIX 1, THE OPINION OF THE KANSAS COURT OF APPEALS IN THE NAME AND STYLE OF STATE v VAN PELT

Appeal from Pottawatomie district court; JOHN W. BROOKENS, judge. Opinion filed February 24, 1978. Affirmed.

Charles S. Scott, of Scott, Scott, Scott and Scott, of Topeka, for the appellants.

Edward W. Pugh, county attorney, and Curt T. Schneider, attorney general, for the appellee.

Before FOTH, C.J., ABBOTT AND PARKS, JJ.

FOTH, C.J.:

By consent the three defendants and an alleged companion were jointly tried to the court on charges of possession of marijuana with intent to sell. They appeal from their conviction and sentence raising four points:

1. The initial stop of the defendants' car was proper under our "stop and frisk" statute, K.S.A. 22-2402 (1), authorizing an officer to stop a person whom he "reasonably suspects" has committed a crime. The officer who made the stop and other local law enforcement officers had been alerted to recent vandalism of some 54 highway signs in the St. Marys area. Just before

going on duty the night before, he had personally inspected a knocked-over sign located near a corn field and bearing blue paint. The fact that defendants' car was blue, trailed corn stalks, and was abroad at 5:20 to 5:30 a.m., in our view gave the officer a reasonable suspicion that it was involved in the vandalism. There is nothing in the record to warrant an inference that the stop was a mere pretext to search the car.

Upon finding the car bore a tag registered to a different vehicle, the officer was justified in checking the driver's story about recently purchasing it. His resulting approach to the car put him in a position to observe the car's interior and its occupants without making a search.

While standing near the car the officer observed a corn knife, a wager jug, a lantern, and several gloves. In addition, he smelled a strong odor which he recognized as that of green marijuana heating. At this point he had probable cause to believe the car contained contraband. That was sufficient to justify the subsequent search, without a warrant, without its being incident to an arrest, and without first impounding the car. State v Atkinson, 215 Kan. 139, 523 P.2d 737; State v Undorf, 210 Kan. 1, 499 P.2d 1105; Chambers v Maroney, 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1875 (1970).

2. Immediately upon arresting defendants and their companion an officer read the Miranda warning to the foursome. Asked if they understood their rights three said yes, one nodded his head in the affirmative. Assuming the defendant Van Pelt was the

head nodder, we think there was sufficient evidence to support the trial court's conclusion that he thereafter knowingly waived his right to silence. The nodding of the head in a universally recognized signal; immediately after the rights were read he said he would talk to the officers; and the incriminating statements were made within five minutes or so. There is no suggestion of coercion or intimidation, and no evidence to cast doubt on the trial court's finding that Van Pelt understood his rights as he had indicated he did. Under these circumstances we cannot reverse the finding. State v Wilson, 215 Kan. 28, 523 P.2d 337, Syl. 2

3. The evidence was sufficient to convict not only the driver, Van Pelt, but the two passengers as well. The fact that the fourth defendant was acquitted by the trial court is irrelevant; no one was able to identify him as an occupant of the car, while the three who were convicted were positively identified in court.

As to the passengers, the court had before it: over 100 pounds of green marijuana in four gunny sacks found in the trunk, giving off a strong odor permeating the car which was easily identified by all officers; three pairs of pruning shears; five corn knives (at least one of which carried marijuana residue); a number of pairs of gloves; more empty gunny sacks; a tarpaulin with marijuana on it; and the lantern and wager jug previously mentioned. The clothes of the two convicted passengers bore particles of green vegetation; although the amounts were too small to identify they did demonstrate their wearer's recent encounter with

nature. On this evidence -- particularly the ample supply of harvesting paraphernalia -- combined with the early morning hour of the arrest, the trial court drew the inference that all occupants of the car were engaged in a joint enterprise to harvest and sell marijuana. Since we cannot say the inference was unreasonable, under established rules of appellate review we cannot disturb the finding. See, e.g., State v Howell, 223 Kan. 282, 286-7, ____ P.2d ____; State v Gobin, 216 Kan. 278, 279-80, 531 P.2d 16, and cases cited therein.

4. Defendants' motions for acquittal and for a new trial were based on the arguments discussed above. For the reasons stated it was not error to deny them.

Affirmed.

APPENDIX 2, DECISION DATED MARCH 8, 1978, DENYING PETITIONERS APPLICATION TO MODIFY OR TO RECONSIDER BY THE KANSAS COURT OF APPEALS.

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellants for Rehearing.

DENIED.

APPENDIX 3, DECISION DATED April 28, 1978, DENYING PETITION FOR REVIEW TO THE SUPREME COURT OF THE STATE OF KANSAS

You are hereby notified of the following action taken in the above entitled case:

Petition for Review.

Considered and DENIED.

APPENDIX 4, MEMORANDUM DECISION OF DISTRICT COURT OF POTTAWATOMIE COUNTY, KANSAS, DENYING PETITIONERS RESPECTIVE MOTIONS TO SUPPRESS DATED JANUARY 25, 1977.

MEMORANDUM DECISION

The above four cases were consolidated for the purpose of hearing and determination of defendants' motions to suppress evidence which the officers found in the inside and in the trunk of the vehicle involved herein. All motions to suppress are identical and all factual determinations apply to all defendants.

Prior to September 21, 1976, several (numbering up to some 54) highway road signs had been knocked down, in the Pottawatomie County area, apparently by vehicles. Police officers and Sheriff's officers within Pottawatomie County, Kansas, had been alerted to be on the lookout for vehicles that might have been involved in this sort of activity.

On the evening of September 20, 1976, St. Marys City Police Officer Owens and Pottawatomie County Deputy Sheriff Etienne had inspected a road sign in the St. Marys, Kansas area that had been knocked down; this sign had blue car paint on it and was close to a corn field.

In the early morning hours of September 21, 1976, approximately 5:15 or 5:30 a.m., officer Owens was sitting in his police car on Bertrand Street (the main street) of St. Marys, Kansas; he noticed a 1962 or 1963 Blue T-Bird Ford proceeding West; there were four occupants of the vehicle; the rear of

the vehicle had corn stalks handing down from the bumper and frame of the vehicle.

Officer Owens stopped the vehicle on Bertrand Street at the West edge of the City of St. Marys, Kansas. His purpose in stopping the vehicle was to determine whether this vehicle might be involved in road sign damage; he suspected that it might be.

The vehicle was driven by Van Pelt, other defendants were passengers. Officer Owens asked Van Pelt for identification; Officer Owens then radioed for a license tag check of the car, and Van Pelt stated the license tag did not belong on this car, the blue Ford T-Bird. As Officer Owens stood near the car door, he noticed a corn knife (a machete type knife) on the floor of the rear seat area, and one of the defendants attempted to cover the corn knife with his foot; the officer also noticed a lantern, a water jug, and several gloves on the floor. Officer Owens smelled a strong odor of green marijuana.

Officer Owens then radioed Pottawatomie County Sheriff's Office for a back up, meaning assistance.

Soon after radioing for a back up, Deputy Etienne arrived at the scene, immediately followed by the arrival of St. Marys Chief of Police Beseau.

When Deputy Etienne arrived, the first thing Officer Owens stated, in substance, was that he had stopped the car, originally, because he thought it might be involved in the damage to the highway sign. Deputy Etienne and Chief Beseau both smelled an odor of green marijuana emanating from the vehicle.

The four occupants of the vehicle, the defendants, were searched for weapons, none being found.

The items in evidence as State Exhibits 1 through 12 were removed from the interior of the vehicle; these consisted of some 3 corn knives, 1 pair of vegetation clippers, 4 gloves, the lantern, the wager jug. In order to see these items inside the vehicle, the officer used a flashlight.

Chief Beseau looked at the trunk of the vehicle, and noticed a hole in the trunk lid; he tried to see through this hole into the trunk with his flashlight, but could see nothing; however, he sensed a strong smell of green marijuana emanating from the interior of the trunk. Beseau asked Van Pelt for keys for the trunk, and Van Pelt replied he did not have keys to the trunk, and the trunk lid could not be opened.' Van Pelt said nothing more.

Chief Beseau used a screw driver to open the trunk, and found therein six burlap bags containing vegetation which he believed to be marijuana. Defendants were then placed under arrest for possession of marijuana.

All defendants were polite and docile at all times; none carried a weapon. No damage was found on teh vehicle.

All three officers knew what green marijuana smells like, and that it has a distinctive odor.

Defendants move to suppress evidence obtained from the interior of the car, States Exhibits 1 through 12, and the six burlap

bags of green vegetation believed by the officers to be marijuana. Defendants claim Officer Owens had no right to stop the vehicle initially, and that such stopping of the vehicle was unlawful. Defendants further claim the search of the vehicle was unlawful, and the evidence should be suppressed.

The State, of course, contends otherwise.

The Court concludes:

A law enforcement officer may stop a person in a public place, without making an arrest, when he reasonably suspects that the person has committed a crime. This principle also applied to the stopping of vehicles. Here Officer Owens knew, prior to stopping the Van Pelt vehicle, that a crime had been committed; that a highway sign had been knocked down by a blue colored car, and this was close by a corn field. Officer Owens was justified and acting appropriately in his suspicion that this vehicle was involved in such crime, and his suspicion was reasonable.

A law enforcement officer may approach and stop a person or a vehicle in an appropriate manner for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. This is the case here. Officer Owens, under the facts known to him, stopped the vehicle, appropriately, and thereafter found the vehicle improperly registered, and found the strong odor of green marijuana emanating from the vehicle. Because there were four occupants of the vehicle, he called for backup.

An officer may search a motor vehicle, under these circumstances, without a warrant, upon probable cause. Probable cause exists when there are facts and circumstances to warrant a reasonable person to believe that the automobile contains contraband. If there is probable cause to search the vehicle, such search need not be incident to an arrest. Here, the officers did have probable cause to search the vehicle for marijuana.

Defendants' motion to suppress is denied.

State v Boone, 220 Kan. 758.
State v Mall, 216 Kan. 287.
State v Tygart, 215 Kan. 409
State v Jackson, 213 Kan. 219.

This memorandum decision filed and is effective this 25th day of January, 1977.

APPENDIX 5, JOURNAL ENTRY OF FINAL JUDGEMENT OF CONVICTION RENDERED IN THE DISTRCT COURT OF POTTAWATOMIE COUNTY, KANSAS, DATED FEBRUARY 21, 1977

JOURNAL ENTRY

Now on this 21st day of February, 1977, the above entitled cause comes on for hearing pursuant to the previous assignment thereof. State of Kansas appears by Edward W. Pugh, County Attorney for Pottawatomie County, Kansas; the defendant appears in person and by his attorney, Charles S. Scott of Topeka, Kansas.

By agreement and with the consent of the Court, this case is consolidated for trial with Case #1,874, #1,875 and #1,876. The defendant advised the Court that he wishes to waive jury trial.

Thereupon, the Court inquires of the parties if they are ready for trial and they answer in the affirmative. Witnesses are sworn and evidence presented on behalf of the State. The State rests. Whereupon the defendant moves the Court for an acquital and after argument of the plaintiff and defendant, said motion is overruled. Whereupon, the defendant announces to the Court that he wishes to present no evidence and rests. The attorney for plaintiff and defendant argue the cause to the Court.

Thereafter, the Court reaches a verdict and the Court's verdict is that the defendant is guilty of the Possession of Marihuana with Intent to Sell, contrary to K.S.A. 65-4127b (b)(3).

IT IS ADJUDGED BY THE COURT, that the defendant is guilty of Possession of Marihuana and Intent to Sell, contrary to K.S.A. 65-4127b (b) (3).

Whereupon the Court makes inquiry of the defendant if he wishes to file post trial motions and the Court grants ten (10) days to the defendant in which to file post trial motions, and sets the hearing on said motions, if filed on the 10th day of March, 1977.

Now on this 10th day of March, 1977, this matter comes on for hearing. The State of Kansas appears by Edward W. Pugh, County Attorney for Pottawatomie County, Kansas; the defendant appears by his attorney, Charles S. Scott of Topeka, Kansas.

The defendants present their post-trial motions filed herein to the Court. The attorney for the defendant makes his argument in support of the motions and rests, and the County Attorney makes his argument and rests.

Thereupon, the Court overrules the post-trial motions and sets this matter for sentencing on the 4th day of April, 1977, at 10:00 o'clock a.m. or as soon thereafter as the Court may hear the same.

Now on this 4th day of April, 1977, this matter comes on for sentencing haveing been continued for this purpose from the 10th day of March, 1977. The State appears by Edward W. Pugh, County Attorney, the defendant appears in person and by his attorney Charles Scott of Topeka, Kansas.

IT IS ADJUDGED that the defendant be committed to the custody of the Secretary of Corrections of the State of Kansas or his authorized representative to be confined until discharged according to law for a period of not less than one (1) year nor more than ten (10) years for the crime of Possession of Marihuana with Intent to Sell, contrary to K.S.A. 65-4127b (b) (3).

IT IS ADJUDGED that the Clerk of the District Court of Pottawatomie County, Kansas, deliver a certified copy of this judgment and commitment to the Sheriff of Pottawatomie County or other qualified officer and that the copy serve as the commitment of the defendant.

IT IS SO ORDERED.

John W. Brookens, Judge
2nd Judicial District
District Court of
Pottawatomie County, Kansas

APPENDIX 6, K.S.A. 65-4105 (d) and K.S.A. 65-4127b (b) (3)

K.S.A. 65-4105 (d) reads as follows:

"(d) any material, compund, mixture or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers and salts of isomers, unless specifically excepted, whenever the existence of these salts, isomers and salts of isomers is possible within the specific chemical designation:
(1) 3,4-methylenedioxy amphetamine;
(2) 5-methoxy-3,4-methylenedioxy amphetamine;
(3) 3,4,5-trimethoxy amphetamine;
(4) Bufotenine;
(5) Diethyltryptamine;
(6) Dimethyltryptamine;
(7) 4-methyl-2,5-dimethoxyamphetamine;
(8) Ibogaine;
(9) Lysergic acid diethylamide;
(10) Marihuana;
(11) Mescaline;
(12) Peyote;
(13) N-ethyl 3-piperidyl benzilate;
(14) N-methyl-3-piperidyl benzilate;
(15) Psilocybin;
(16) Psilocyn;
(17) Tetahydrocannabinols."

K.S.A. 65-4127b (b) (3) reads as follows:

"(b) Except as authorized by the uniform controlled substances act, it shall be unlawful for an person to sell, offer for sale or have in his possession with the intent to sell:
...(3) Any hallucinogenic drug designated in subsection (d) of K.S.A. 65-4105; or..."

APPENDIX 7, K.S.A. 8-1570 (3)

K.S.A. 8-1570 (3) reads as follows:

"(3) When the person driving or in control of such vehicle is arrested for an alleged offense for which the officer is required by law to take the person arrested before a judge of the district court without unnecessary delay."

APPENDIX 8, PETITIONERS MOTION TO SUPPRESS ILLEGALLY SEIZED EVIDENCE

MOTION TO SUPPRESS ILLEGALLY SEIZED EVIDENCE

Comes now the above named defendant pursuant to K.S.A. 22-3216 and moves the Court for an order suppressing those items that were removed from the trunk and the interior of a 1962 T-Bird Ford automobile on or about September 21, 1976, for the following reasons, to-wit:

That on said date at or about 4:30 a.m., defendant Perl G. Van Pelt was operating his newly acquired T-Bird Ford in a lawful manner within the city limits of St. Marys, Kansas. Accompanying him as passengers were Larry Wayne Soderlund, Ronnie Torkelson and Kenneth Browning. An officer of the St. Marys Police Department signaled for the car to stop. Pursuant to said signal to stop, the car was stopped accordingly. Thereafter the officer approached the car and made inquiry as to who the owner was. Thereupon the officer communicated either to the Sheriff's Office of Pottawatomie County and/or the Kansas Bureau of Investigation, and soon thereafter a deputy sheriff and an officer of Kansas Bureau of Investigation arrived and immediately with the aid of a tire iron pried open the trunk of said car and removed therefrom three (3) sacks of green vegetation. In addition thereto, items within the interior of the car, i.e. gloves, corn knives, three (3) mens coats and trash bags were also removed by said officers.

Defendant further states that he nor any other person in said vehicle were committing any unlawful act or doing anything to give the police officer any probable cause or justification for stopping said vehicle. The said items listed above were seized by the officers in addition to impounding said vehicle, and are presently in possession and control of said officers under the pretense of being held to be used in evidence against this defendant and the other defendants charged with possession with intent to sell marihuana, contrary to such statutes made and provided.

The said items were illegally obtained and such items should be suppressed as being illegally obtained, on the basis of being illegally seized without a proper search warrant and lacking the probable cause for the said officers to have seized the same.

WHEREFORE defendant prays the Court to suppress the said evidence for the reasons hereinabove set forth.